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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. [redacted] 132

JOHN RODERICK, as Trustee of Mrak Coal Company, WILLIAM MRAK and ELEANOR MRAK, the Real Parties in Interest,
Petitioners,

vs.

CHUGACH ELECTRIC ASSOCIATION, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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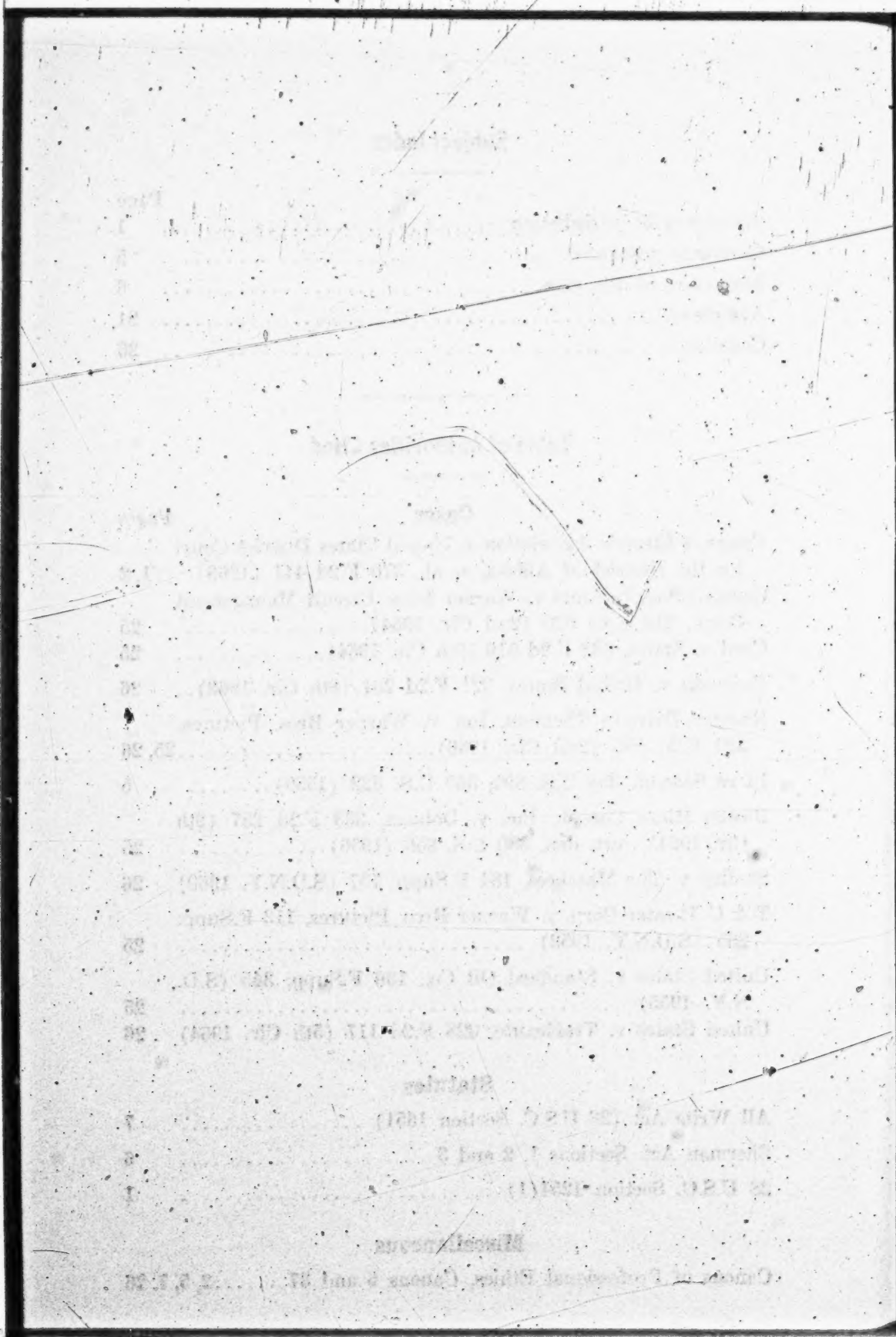

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STATEMENT OF JURISDICTION

Petitioners request this Court to review, pursuant to 28 U.S.C. §1254(1), the decision of the Ninth Circuit (*Chugach Electric Association v. United States*

District Court for the District of Alaska, et al., 370 F.2d 441 [1966]) ordering the disqualification of Edgar Paul Boyko and his law firm from further appearance in that litigation. This decision is totally irreconcilable with the law in the Second, Fifth and Eighth Circuits; it completely and unjustifiably changes existing law as to the standards for attorney disqualification; and it represents an inexplicable departure from all rules of appellate review giving presumptions of correctness to trial court findings.

The appellate decision, reversing the judgment of the district court is so fraught with abstractions (substituting the same for legal precedent or its logical extrapolation) as to constitute an unwarranted and dangerous deterrent to any attorney from ever representing a business client because he may later stand accused, without justification and without any burden of proof placed upon the accuser, of breaching confidences. Worse yet, he may be convicted upon these accusations by mere inferences and generalizations arising from the kind of litigation involved, *i.e.*, a private antitrust suit.

The freedom of an attorney to represent clients of his own choosing and the right of any client to retain an attorney to oversee the legal aspects of business affairs would thus be jeopardized, at least in all future antitrust litigation in the Ninth Circuit, if the sweeping rule announced below is permitted to stand. Such a rule revolutionizes this field of law (relating to the purposes and scope of Canons 6 and 37 of the Canons of Professional Ethics) not by any breakthrough of

legal thought, but through the back door of economic coercion of the legal practitioner.

The extraordinary decision of the Ninth Circuit prohibits an attorney from representing the plaintiff in antitrust litigation against a former business client, simply because the action *is* in the nature of antitrust. The mere nature of the lawsuit is thus the Ninth Circuit's rationale for disqualification of Boyko—despite the findings of the district court, for which there is sufficient evidence, that (1) Boyko's representation of the former client, Chugach Electric Association (CEA), terminated before any alleged violation of the antitrust laws could have occurred; (2) no conflict of interest by Boyko's representation of the plaintiffs was established by CEA; and (3) there is no substantial relationship between the former representation of CEA and the issues of this action.

In summarily setting aside these findings, and substituting its own findings (discussed below) based on the evidence before the district court, the appellate court not only made the All Writs Act proceeding the equivalent of an interlocutory appeal, contrary to law, but it also eliminated all proper expectations that the trial court's findings would be given a presumption of correctness. Rather than even nominally adhere to the usual presumption that the findings of the trier of fact should be upheld unless they are clearly unsupportable, the Ninth Circuit chose instead to fashion a new and unique rule for attorney disqualification which does not require *any* factual showing of conflict of interest or breach of confidence.

This removal of the requirement of meeting even the light burden of proving an arguable factual justification for the extreme remedy of attorney disqualification is in contravention of the law in all circuits which have considered the question (including the Ninth Circuit until its present decision), that the former client must demonstrate a *substantial* relationship between the subject matter of the former representation and the issues of the suit in which the former attorney represents the adverse party. Under the rule which is followed in the other circuits, the former client's burden is merely to show some factual basis, without the necessity of proving actual conflicts of interest or breaches of confidence. If this showing is made, inferences of conflict or breach will be drawn, and the party thus will not have to expose the very confidences he wishes to protect.

But, under the Ninth Circuit formulation of the grounds for attorney disqualification in an antitrust action, all that need be shown in support of the accusation of violating professional ethics is that the attorney, however many years before the alleged acts of antitrust violation, once represented the client as its general business counsel. No circuit has come close to this extreme position which permits disqualification upon the mere invocation of former representation coupled with a total absence of factual relationship between the former representation and the litigation.

The result of the Ninth Circuit's opinion is that there is now a sharp conflict among the circuits, which can only be resolved upon granting certiorari so that

the matter may be fully argued and decided, or, in the alternative, so that the case can be remanded for further hearing or for the taking of additional evidence.

As part of its supervisory powers over the federal judiciary, this Court in *In re Sawyer, cert. granted,* 358 U.S. 892, 360 U.S. 622 (1959), reviewed an important question concerning the Canons of Professional Ethics. The questions of attorney disqualification raised in this case are no less important, and, for the reasons discussed below, this Court is respectfully requested to reverse the appellate judgment.

QUESTIONS PRESENTED

The questions to be decided are (1) whether the district court's findings of fact should have been summarily set aside in a mandamus proceeding where the only issue properly before the court of appeals was whether the district judge clearly abused his discretion or committed out right error;

(2) whether an attorney may be disqualified under Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association from appearing in an antitrust action against a former client, once represented by him in its business affairs, where there is no showing of a substantial relationship between the subject matter of the former representation and the issues and subject matter of the present litigation; and

(3) whether more evidence should be proffered to the district judge before a proper determination may be made as to whether Edgar Paul Boyko should be disqualified from further representation of the plaintiffs in this action.

STATEMENT OF THE CASE

A complaint was filed on April 7, 1965 in federal district court for the District of Alaska in which John Roderick, as trustee of the bankrupt Mrak Coal Company, a corporation, and William Mrak and Eleanor Mrak were named as plaintiffs, and three corporations, Chugach Electric Association, hereinafter referred to simply as CEA, Placer Development, Ltd. and Evan Jones Coal Company, were named as defendants.

The complaint, based on Sections 1, 2 and 3 of the Sherman Act, was prepared by the law firm of Boyko and Tulin and by Edgar Paul Boyko, who were named as attorneys of record for the plaintiffs. Placer was an international holding company which, it is alleged in the complaint, exercised control over Evan Jones and its officers. Both Mrak and CEA were involved in the production and sale of coal and the generation of electric power in Alaska. The complaint alleges that beginning in July, 1957, CEA devised a plan by which it could dominate the market for the generation and supply of electric power in South Central Alaska; that pursuant to this plan, CEA entered into a conspiracy with Placer and Evan Jones; and that one

of the successful objects of the conspiracy was to remove Mrak from the electric power market by causing its financial destruction.

The plaintiffs were permitted to amend their complaint to make clear that all the alleged conspiratorial agreements and acts occurred at the earliest in July of 1957 and thereafter, at a time when Boyko, who had previously been CEA's attorney, no longer represented it in any way and had completely terminated all attorney-client connections.

Prior to filing of the amended complaint, CEA moved to disqualify plaintiffs' attorneys, hereinafter referred to merely as Boyko, from representing plaintiffs on the ground that Boyko's continued representation was in violation of Canons 6 and 37 of the Canons of Professional Ethics. Memoranda and affidavits were filed by plaintiffs and by defendant CEA, and the motion came on for hearing before the Honorable Raymond E. Plummer, Judge of the District Court of Alaska. In a written memorandum of decision, containing findings of fact and conclusions of law, Judge Plummer denied the motion. The memorandum of decision is reprinted in full in Appendix A.

CEA thereupon petitioned the United States Court of Appeals for the Ninth Circuit pursuant to the All Writs Act (28 U.S.C. §1651) for writs of mandamus and prohibition directing the disqualification of Boyko. Judge Plummer's reply to the petition is reprinted in full in Appendix B. The petition was

granted and the District Court was ordered to enter Boyko's disqualification; a petition for rehearing was denied. The appellate court's opinion is reprinted in full in Appendix C.

The factual record before the District Court Judge, upon which he based his findings, and which record the Ninth Circuit conceded revealed no conflict of interests, consisted of the following documents: (1) the complaint, as amended; (2) the affidavit of Terrence G. Mackle, a CEA director, in support of the motion for disqualification; (3) the affidavit of Edgar Paul Boyko in opposition to the motion; (4) the supplemental affidavit of Mackle; and (5) the supplemental affidavit of Boyko.

The following are the undisputed facts from the affidavits of Boyko and Mackle:

Beginning in October, 1954, Boyko represented CEA on a non-exclusive retainer basis, *i.e.*, he continued in the active practice of law and represented many other clients in various and diverse matters. At no time was he an employee or exclusively the attorney for CEA or for any other client. During the period of time when Boyko represented CEA, and commencing on March 12, 1955, Mackle was and still is a member of CEA's board of directors. The retainer contract between CEA and Boyko provided that the latter was "to represent and counsel the Association (CEA) in all legal matters" in which CEA was involved, and by the retainer Boyko was to be CEA's general counsel.

From October, 1954 until March 31, 1956, Boyko maintained his offices on CEA's premises. On the latter date, he resigned as general counsel and the retainer contract was terminated by mutual consent; Boyko then reopened his own office in downtown Anchorage. On July 1, 1956, a limited one-year retainer agreement was entered into between CEA and Boyko, wherein Boyko was employed "in a consulting capacity to supervise and have charge of the law business of the Association". By the terms of the agreement, Boyko agreed "not to represent any person, association, corporation, municipality, body politic or any other legal entity in any matter in conflict with the interests of said Association".

As more fully appears in the district court's memorandum of decision, subsequent to the formation of CEA, conflicts arose between it and the City of Anchorage concerning, *inter alia,* the distribution of electricity in the Anchorage area. These conflicts produced extensive publicity, discussion and litigation. A sharp cleavage developed among the CEA board of directors resulting in two highly disputatious factions, the majority or "pro-management" group of board members and a minority "anti-management" group which included Mackle.

On April 6, 1957, following the election for the first time of the anti-management group as a majority of the board, Boyko, who had supported the policies of the pro-management group, offered his resignation. He thought it best to resign to permit the new man-

agement to select counsel of their own choosing. His resignation was accepted on April 8, 1957, but Boyko offered to stay on in a limited capacity as special counsel in one matter, an appeal involving property tax litigation among CEA, the City of Anchorage and the Anchorage Independent School District. The new board, however, did not seek his assistance and retained other counsel. The new board also later fired the general manager and brought in new management.

Prior to June 30, 1957, after receiving payment of his retainer fee for the remainder of the month of April and for May and June, the unexpired period of the retainer agreement, Boyko returned all files to CEA. Since that time, he has had no professional communication or contact with CEA and, in fact, left Alaska in 1957 and did not return there until 1964. He never had the confidence of the persons who became the new management of CEA in April, 1957. After termination of the attorney-client relationship, Boyko for a number of years deliberately refrained from representing parties adverse to CEA to avoid any suspicion of impropriety, even though he had many opportunities to accept such retainers.

The disputed areas of fact in the opposing affidavits are as follows:

Boyko expressly and completely denied knowledge of any confidential information obtained during his representation of CEA which relates to any part of the subject matter or any of the issues of the present action; the only confidential information he acquired

was limited to those CEA projects in which he performed legal services, and these projects, which were substantially undertaken and completed before the election of the anti-management board, have no bearing on the unlawful conduct or activities set forth in the complaint.

Mackle expressly asserted, without elaboration, that confidential information concerning these projects is indeed related to the acts alleged in the complaint, notwithstanding that the complaint on its face encompasses events occurring when Boyko was no longer CEA's attorney and was not even in Alaska, and notwithstanding that Boyko took no part in any of the conduct of CEA's officers and directors alleged as violating the Sherman Act.

Specifically, the disputed areas are:

1. With reference to the allegations in paragraph 13 of the amended complaint, hereinafter referred to as the complaint, that commencing in July, 1957 CEA conspired to dominate the market for the generation and supply of electric power in South Central Alaska, Mackle makes the conclusionary and unsupported contention that Boyko had full access to and obtained unspecified confidential information concerning (1) CEA's market position; (2) its power or potential power to dominate such market; and (3) the proposed replacement and/or supplementing of CEA's coal burning power generating facilities with other power sources.

In answer to these charges, Boyko stated that at no time while he was attorney for CEA did it have

power or even potential power to dominate the market for the generation and supply of electric power in South Central Alaska; that this power was not acquired until after the post-1957 construction of the Cooper Lake electric power project by CEA, that he had no knowledge or confidential information concerning the proposed replacement or supplementing of CEA's coal burning generating facilities with commercial gas, since commercial gas was not discovered nor did it become available until after he had severed his relationship with CEA.

He was familiar with the proposed development of hydroelectric power by the Central Alaska Power Association, hereinafter referred to as CAPA, but this would not have led to any monopoly or potential monopoly on the part of CEA since CEA was then still a member of the CAPA and was subject to the controls of that cooperative association.

2. With reference to that part of the complaint (paragraph 13) alleging that the primary object of the conspiratorial plan was to insure CEA's position as sole seller of retail electrical power owning its own power generating facilities, which it had enjoyed from the completion of its Cooper Lake project, Mackle asserts that Boyko had full access to and obtained confidential information concerning CEA's market position as seller of electric power with its own generating sources, in view of its partial ownership of the Knik Arm Power Plant, a facility in existence long before construction of the Cooper Lake plant.

Mackle goes on to assert that Boyko had access to information concerning the acquisition, expansion and construction of CEA's power generating facilities as well as its proposed power projects, including purchase of the Inlet Power and Light Company; the interest in the Knik Arm Power Plant owned by Alaska Railroad; the Cooper Lake project; and the proposed atomic power project designed to replace coal burning facilities at the Knik Arm plant.

Boyko replied that none of the above projects, with which he was familiar, have the remotest bearing upon any of the issues, facts or material allegations in the litigation, since CEA did not become the sole seller of retail electric power with its own power generating facilities until *after* the Cooper Lake project had been constructed, which was after termination of the attorney-client relationship. Moreover, the Cooper Lake plant had originally been a project of the CAPA, of which CEA was merely a member during the time of the plant's construction.

3. With reference to that part of the complaint (paragraph 15) which alleges that CEA's competitors are dependent upon CEA at crucial periods of the year when power demands are highest, and that this strategic position gives CEA power to limit the growth and development of its competitors, Mackle asserts that Boyko had access to and obtained confidential information concerning the numerous attempts by CEA to obtain "acceptable agreements with other power distributors for the cooperative construction of future power generating facilities".

Boyko controverted this charge as follows:

> "I did not and could not have any confidential information with respect to any existing or future dependency of CEA's competitors on CEA for power demands, because such did not exist during the period that I was attorney for CEA, except for the usual mutual assistance rendered by competing power distributors in case of outages and the like, with which this lawsuit is not concerned. . . . None of the attempts by CEA to obtain acceptable agreements with other power distributors for the cooperative construction of future power generating facilities, with which I was indeed familiar, have any bearing on this case, *since the same were reversed and abandoned by the new management following the termination of my agreement*" (emphasis added).

4. With reference to that part of the complaint (paragraph 15) alleging that CEA's position was threatened by a proposed plan of Matanuska Electric Association, hereinafter referred to as MEA, to construct its own power generating facilities in the heart of the coal producing region in the Matanuska Valley —the so-called "mine-mouth project"—and that CEA took unlawful steps in 1962-1964 to eliminate the project, Mackle asserts that Boyko had access to confidential information concerning the relationships between CEA and MEA, including various attempts to reach "acceptable cooperative arrangements" for the construction of future power generating facilities, and that Boyko thereby was aware of the impact upon CEA of any MEA proposal to construct its own power generating facilities.

Boyko challenged this assertion on the ground that he never had nor could he ever have had confidential information concerning the MEA mine-mouth project, since he was never attorney for MEA and, to the extent of his own knowledge, there were never any confidential disclosures made by MEA to CEA with regard to this project. Moreover, he pointed out that CEA's attempts to thwart the project occurred more than five years after he had represented CEA.

5. Mackle next addresses his accusations to those parts of the complaint (paragraphs 15, 26) alleging that CEA's position of dominance over the sale of electric power in South Central Alaska provided it with the leverage to destroy Mrak and to remove the competition of MEA, and that commencing in 1958 with construction of the Cooper Lake project, CEA acquired monopoly power in each of the following markets: (1) the supply of retail electric power to consumers in the greater Anchorage, the Knik Arm and the Turnagain Arm areas; (2) the supply of wholesale electric power in South Central Alaska to meet peak demands of other electric power companies; and (3) the market encompassing the total distribution of retail electric power in South Central Alaska by all suppliers.

With respect to these portions of the complaint, Mackle claims that Boyko had access to and obtained information concerning (1) CEA's acquisition of a preliminary permit from the Federal Power Commission for construction of the Cooper Lake project; (2) plans and financing for the project; (3) forma-

tion and operation of the proposed generating and transmission cooperative, the CAPA; (4) all matters leading to the withdrawal of MEA from CAPA; (5) matters relating to CEA's own dissatisfaction with CAPA; and (6) the history, policy and reasons leading to CEA's withdrawal from CAPA on May 8, 1957 at a time when Boyko was still receiving salary as CEA's attorney and when he still had CEA's files in his possession.

Boyko responded that, during the time when he was still attorney for CEA, there was no dissatisfaction with CAPA either by the majority of CEA's management or as stated in its official policy, but only by the minority group which was to become dominant by virtue of the election in April, 1957. At the time the new management withdrew from CAPA, Boyko was no longer CEA's attorney, and the withdrawal was accomplished without his knowledge or consent and over his stated opposition during the time he represented CEA. There were no confidential communications to which Boyko was privy in regard to any of the actions of the new management, including CEA's withdrawal from CAPA.

6. With reference to that part of the complaint (paragraph 16) which alleges that Evan Jones, although financially stronger than Mrak and the operator of extensive coal producing facilities, was dependent on the continued existence of demand for coal from two major customers, CEA and the United States Department of Defense, Mackle states that Boyko had access to and obtained confidential infor-

mation concerning the dependency of Evan Jones upon coal sales to CEA, and that such sales had terminated in 1956 while Boyko was still CEA's attorney.

Boyko answered that none of the coal purchases by CEA from Evan Jones prior to 1956 have any relevancy to this case in that only the pattern of CEA's dealings with Mrak from 1960 and thereafter form the subject matter of this action; that although the coal transactions between CEA and Evan Jones occurred while the pro-management board was still in office, references are made to Evan Jones' coal producing facilities before April, 1957 solely for the purpose of establishing that the overt acts occurring during and after 1960 were made pursuant to the conspiracy, involving Evan Jones' market position as alleged, formed after the anti-management group elected a majority of CEA's directors.

7. With reference to that part of the complaint (paragraph 19) which alleges that as of 1956 Mrak had been supplying coal to CEA for a short time, and that part of CEA's plan was to encourage Mrak to enter into a series of extensive coal supply arrangements beginning in the fall of 1956 and annually or bi-annually thereafter, Mackle asserts that Boyko had full access to and obtained confidential information relating to (1) the first coal supply contract entered into between Mrak and CEA on August 28, 1956; (2) the "contractual relationships" between CEA and Mrak; and (3) the matters preceding consummation of the second coal contract between Mrak and CEA executed on September 1, 1957.

The above accusations of breached confidence relate to a significant part of plaintiffs' case, *viz.*, the allegation (paragraph 20) that, in the fall of 1956, by intentionally taking advantage of the fact that Evan Jones had discontinued coal purchases from Mrak (thereby forcing Mrak to look for other markets), CEA entered into two successive contracts with Mrak covering the period from the fall of 1957 to the fall of 1962. The prices in these contracts were so favorable to Mrak, as alleged in the complaint, that Mrak had become substantially dependent upon making sales to CEA, and CEA could pull the economic rug out from under Mrak whenever it chose.

Expanding upon his contention that Boyko acquired confidential information as to the contract of August 28, 1956, but with no further explanation of how Boyko acquired information of contracts entered into after he resigned, Mackle asserts that as early as 1956 Mrak was looking for other markets and had therefore entered into the one-year coal supply contract with CEA on August 28 of that year. He goes on to state that if Mrak were substantially dependent on CEA, as alleged, such dependency would necessarily have commenced with the first coal contract, which he claims was prepared under the auspices and general direction of Boyko.

Boyko, in direct challenge, stated that he took no part in entering into the contract of August 28, 1956, which expired one year later by its own terms and is not involved in this litigation, and that the only contract between CEA and Mrak set forth in the com-

plaint, wherein it is alleged as having been breached pursuant to the conspiracy, was executed in 1960, long after termination of any attorney-client relationship between Boyko and CEA.

After submission of the foregoing affidavits and following oral argument the district judge entered a memorandum of decision denying the motion to disqualify Boyko. In his written opinion Judge Plummer made the following findings of fact based on the opposing affidavits:

> "Subsequent to the acceptance of Boyko's resignation on April 8, 1957, and sometime in or about July, 1957, the exact date being unknown, the activities on which the present case is predicated began.
>
> "There has been no showing that during Boyko's employment as general counsel for C.E.A. prior to April 6, 1957, he received or had access to secret or confidential information related to the issues in the present case.
>
> "The court concludes that C.E.A., to date, has failed to establish that there is a 'substantial relationship' between the issues in the present case and the subject matter of Boyko's former representation" (see Appendix A, Memorandum of Decision, page v).

In his reply to CEA's petition for writ of mandamus attacking his findings, Judge Plummer explained his decision, as follows:

> "It is the district judge's understanding from a reading of the portions of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association . . . that the same pertain

only to secrets which have been divulged and confidences which have been entrusted by the client to the attorney.

"It is also the district judge's understanding from the cases cited and the arguments made by learned counsel that the rule of law established by the authorities may be stated generally to be that where any 'substantial relationship' can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter representation will be prohibited. If such a 'substantial relationship' is shown, there need be no further showing of actual confidences and actual prejudice; such will be assumed.

"Petitioner, in its memorandum at page 22, states in part:

" 'The court below made no attempt in its memorandum decision to resolve any questions of creditability as to those matters where there was a conflict between the affidavits.'

"The district judge was of the opinion that the conclusions set forth in his memorandum of decision made it plain that where there was a conflict between the affidavits filed by Mr. Mackle and Mr. Boyko, the court had elected to believe the factual statements contained in the affidavit and supplemental affidavit filed by Mr. Boyko.

"In weighing and considering the affidavit and supplemental affidavit filed by Mr. Mackle, the district judge took into consideration his interest in the motion before the court and the outcome thereof, and his motive in submitting the affidavits. The judge took into consideration the fact that from March 12, 1955, until a short time prior

to April 8, 1957, when Mr. Boyko's resignation was accepted, Mr. Mackle had been one of the anti-management board members who considered the vote of the membership at the 1957 election to be a 'mandate to fire Boyko'.

"The district judge gave some consideration to the fact that the affidavits were submitted by Mr. Mackle when Marlin S. Stewart, who was the general manager of C.E.A. from its commencement until sometime after April 8, 1957, and is presently a member of the board of directors of C.E.A., and Richard B. Smith, the present secretary of the board who has been a board member since prior to April 8, 1957, were available for the signing of such affidavits.

"In connection with the affidavits filed by Mr. Mackle and Mr. Boyko, the district judge also considered the probability or improbability of the statements contained therein in the light of conditions and circumstances which existed with reference to the affairs of C.E.A. and which were a matter of common knowledge in the Anchorage area during the material period of time. After doing so, the district judge concluded that it was inherently improbable that the matters alleged in the amended complaint and matters substantially related thereto, if in fact such occurred, came into existence until after the 1957 election of C.E.A." (see Appendix B, Reply to Petition for Writ of Mandamus, pp. x-xii).

ARGUMENT

In announcing what is surely the farthest and a wholly unprecedented extension of all judicial rules

concerning the disqualification of an attorney in antitrust actions against a former client, the Ninth Circuit appears to have entered a thicket of pure speculation, and, in so doing, has created an undesirably sweeping rule of law which, in this case, has operated to usurp the functions of the trier of fact. Though graciously announcing that it reached its decision regretfully because no conflict of interests was shown, the court ordered Boyko's disqualification because he had once been CEA's general counsel and thereby learned something about CEA's business activities, even though this knowledge has nothing to do with the present litigation.

The appellate court, in thus ruling, set aside the findings of the district court, without any suggestion that these findings were improper or not supported by the evidence. These findings, which in large part are resolutions of disputed facts, are as follows: (1) the alleged acts of conspiracy and antitrust violations occurred subsequent to Boyko's resignation and the installation of CEA personnel who had not given Boyko their confidence; (2) there was no showing that Boyko had even access to, much less received, confidential information relating to the issues of this case; and (3) by reason of the foregoing, CEA failed to meet even the light burden of showing a substantial relationship between the former representation and the issues of this case, as required by existing law. Thus, as the district court correctly ruled, there was no factual basis from which could be drawn any inference of violation by Boyko of either Canon 6 or Canon 37.

The clear import of the Ninth Circuit's judgment setting aside these findings without comment, is that the *status* of prior representation as general counsel, without more, is sufficient to prohibit an attorney from participation in an antitrust suit against his former client. The stated rationale for this drastic change in existing law is that Boyko, although admittedly now shown to have directly or indirectly acquired any information relating to this action, "was in a *position* to acquire knowledge casting light on the purpose of later acts and agreements", and that such position created a "likelihood . . . that Mr. Boyko's knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery" (emphasis added; 370 F.2d at 443).

What the court appears to be saying is that whenever the litigation happens to be a private antitrust suit, the defendant's former attorney, simply because he learned of unrelated business matters, can automatically rely on this irrelevant information during the course of discovery to acquire information which, if *it* had been discovered during the former representation, *it* would be deemed confidential. The court reached this result on the theory that because CEA is alleged to have committed antitrust violations, Boyko, as general counsel, was irrefutably exposed to "[a]ntitrust views and attitudes" and that the publicity surrounding the cleavage of CEA's directors "does not eliminate the probability that that [secret] infor-

mation respecting purpose and expectations" was made available to Boyko (370 F.2d at 443).

This is an extraordinary postulation and so clearly dependent on speculative processes as to constitute a failure of judicial responsibility, particularly when the trier of fact has made findings which in other contexts, at the very least, would not be ignored as they were here. Beyond setting aside the findings of the district court, the Ninth Circuit has completely changed the rule existing in the Second, Fifth and Eighth Circuits that in order to disqualify an attorney, he must be shown to have had access to tangible information relating to the lawsuit (without any requirement, however, that the information be disclosed).

If the Ninth Circuit's decision stands, virtually no attorney can ever appear against a former client in an antitrust action filed in that large circuit if he might have seen, heard or felt intangible antitrust "views and attitudes" during the course of his retainer as general counsel. This result is neither intended nor required by Canons 6 and 37. The patent unfairness of this extreme and absolute rule *is* intolerable to the independence and professional integrity of the bar, and it works a disastrous disservice not only to plaintiffs in antitrust actions, for it may well be blanketly applied in cases of business fraud, trade secret violation, etc.

The appellate opinion does not and cannot cite a single case as authority for the unique proposition it

announces. Indeed, there are no cases which may even remotely be considered as precedents for a rule which allows a finding in violation of Canons 6 and 37 whenever the attorney in question was once under general retainer to a client now on the other side of an anti-trust lawsuit.

The rule in the Second, Fifth and Eighth Circuits (as well as in the Ninth Circuit prior to the opinion in this case) and in the state courts, and followed by the district judge below, is that the party seeking disqualification must make a showing of a *substantial* factual relationship, and hence of a reasonably inferable conflict of interests or breach of confidence, between the issues or the subject matter of the action in question and of the subject matter of the prior representation. This test of substantial relationship is followed in one form or another by the courts in every case, including those very cases cited in written argument by CEA.

This had been the rule in the Ninth Circuit: *Pioche Mines Consol., Inc. v. Dolman,* 333 F.2d 257, 265-66 (9th Cir. 1964), *cert. den.* 380 U.S. 956 (1956); *Cord v. Smith,* 338 F.2d 516 (9th Cir. 1964).

It is the law in the Second Circuit and in the Southern District of New York: *T & C Theater Corp. v. Warner Bros. Pictures,* 113 F.Supp. 265, 270-71 (S.D.N.Y. 1953); *Consolidated Theaters v. Warner Bros. Circuit Management Corp.,* 216 F.2d 920 (2nd Cir. 1954); *United States v. Standard Oil Co.,* 136 F. Supp. 345 (S.D.N.Y. 1955); *Harmar Drive-in Thea-*

ters, Inc. v. Warner Bros. Pictures, 329 F.2d 555 (2nd Cir. 1956); *Shelley v. The Macabees,* 184 F.Supp. 797 (S.D.N.Y. 1960).

The same test is followed in the Fifth Circuit: *United States v. Trafficante,* 328 F.2d 117 (5th Cir. 1964); and in the Eighth Circuit: *Gajewski v. United States,* 321 F.2d 261, 267 (8th Cir. 1963).

In short, three circuits have recognized that there must be some balance between the respective burdens of proof of the party seeking to disqualify an attorney and of the latter in attempting to show that there is no just cause for the harsh order of disqualification. The Ninth Circuit, however, has completely destroyed this balance by assuming, as a matter of law in antitrust cases, that where conflict of interest or abuse of professional confidence is asserted, there is sufficient doubt raised by the mere assertion to justify disqualification notwithstanding the failure of the moving party to demonstrate even an arguable factual basis for the disqualification.

CONCLUSION

The absolute and sweeping rule announced below does not conform with the scope and purpose of Canons 6 and 37 to protect against conflict of interest and breach of a client's confidence, and completely contravenes the application of these Canons in the Second, Fifth and Eighth Circuits. The Ninth Circuit alone has created an unfair rule which, without any factual justification, punishes an attorney and his

client on the novel theory that there is such a thing, independent of actual conduct, as antitrust views and attitudes to which an attorney under a general business retainer cannot avoid exposure, even though all antitrust violations occurred after termination of the attorney-client relationship and of the opportunity to detect such views and attitudes.

As the district court properly found, by following the fair standards for attorney disqualification adhered to in other circuits, Boyko's former representation of CEA has not been shown in any manner to have a substantial relationship to the present antitrust action in which CEA is a defendant, and his continued representation of plaintiffs thus can work no harm to CEA within the prohibitions of Canons 6 and 37.

Certiorari accordingly should be granted and the judgment of the Ninth Circuit reversed, or, in the alternative, the case should be remanded for further hearing or the taking of further evidence on the question of whether grounds for disqualification have been sufficiently demonstrated.

Dated, May 4, 1967.

Respectfully submitted,
EDGAR PAUL BOYKO,
Attorney for Petitioners.

Of Counsel:
BOYKO AND SIMMONS,
MICHAEL W. ROTBERG.

(Appendices Follow)

Appendix A

In The United States District Court
For the District of Alaska
At Anchorage

No. A-35-65 Civil

John Roderick, as Trustee in Bankruptcy of Mrak Coal Company, a corporation in Reorganization Under Chapter X of the Bankruptcy Act, William Mrak and Eleanor Mrak,

Plaintiffs,

vs.

Chugach Electric Association, a corporation, Placer Development, Limited, a Canadian corporation, and Evan Jones Coal Company, a corporation,

Defendants.

MEMORANDUM OF DECISION

This matter comes before the court on the motion of Chugach Electric Association to disqualify Edgar Paul Boyko and the law firm of Boyko and Tulin (for convenience, hereinafter referred to as Boyko) from appearing as legal counsel for plaintiffs and representing them in the prosecution of this action.

The ground of the motion is that Boyko's appearance and representation of Mrak violates Canons 6

and 37 of the Canons of Professional Ethics. C.E.A. claims that Boyko previously represented it in legal matters "substantially related" to the issues in the present case. C.E.A. asserts that, in fact, Boyko was its counsel at the time the alleged conspiracy arose and at the time of the overt acts alleged in the complaint.

C.E.A. is an unincorporated cooperative association formed under the laws of the State of Alaska with its principal place of business at Anchorage. It was and is governed by a seven-man Board of Directors. The meetings of the Board at all times material, were open to its members, the interested public and representatives of the press and other news media.

In addressing the court in connection with this motion, counsel for C.E.A. stated, in part, as follows:

"But Your Honor knows it's certainly a matter of very common knowledge to any of us in this community for any number of years, that the continuing legal and other problems of Chugach Electric Association was a matter of great public discussion for a period of time, and unfortunately that period is not completely ended, during which one could hardly pick up a local newspaper, turn on a local radio, or view local television concerning itself with the news without hearing some reference to disputes involving Chugach Electric Association, and more frequently than not, the City of Anchorage."

Courts may take judicial notice of matters of common knowledge. On that basis the court takes judicial notice of the following facts which were matters of

very common knowledge in Anchorage, Alaska, and the surrounding area at all times material to this case:

a. Subsequent to its formation conflicts arose between C.E.A. and the City of Anchorage with reference to areas to be supplied by their respective electrical systems, annexation proceedings and matters directly or indirectly related thereto. These conflicts resulted in public statements and discussions, the paralleling of power lines and litigation, all of which were well publicized by the local newspapers, radio and television stations.

b. Over a period of time a very definite cleavage developed among the Board members. This eventually resulted in four Board members being strongly pro-management and three Board members anti-management. Both groups were vigorous and publically vocal in their criticism of the other group and in advocating their respective positions.

c. For a period of at least several years the open and public disputes between the Board members and the efforts of the majority members to remain a majority and the efforts of the minority members to become the majority resulted in many public statements and discussions. As a result the annual meeting and election of directors of C.E.A. was a matter of general interest to those residing in the Anchorage area.

d. By reason of the foregoing, the affairs and activities of C.E.A. became newsworthy. There were at the time two local newspapers in Anchorage. One of these generally reported the activities of the majority

members and management in detail and in a favorable light. The other paper became the sounding board, so to speak, for the minority members and the City of Anchorage. In addition, the radio and television stations did their part to keep the public informed in regard to the activities of C.E.A.

The pros and cons of the plans, policies and actions of C.E.A. were publicly discussed and debated. Thereafter they were reported by local news media and for many years were matters of general and common knowledge and interest in the Anchorage area.

From late 1954 until April 8, 1957, Mr. Boyko actively represented C.E.A. as its general counsel.

At the annual meeting and election of C.E.A. in 1957 the anti-administration forces succeeded in electing a majority of the Board and the principal officers of the corporation.

Inasmuch as Boyko had been in direct conflict with the advocated programs and policies of what had theretofore been a minority of the Board and subsequent to the election became a majority, he, on April 6, 1957, submitted his resignation. At a special meeting of the Board of Directors held two days later on April 8, 1957, it was decided by a majority vote that Boyko's resignation be accepted immediately and that his monthly retainer be paid for the balance of his contract (for April, May and June of 1957).

Following the election of Directors at C.E.A.'s annual meeting in 1957 there were changes in management and policies of C.E.A. The acceptance of Boy-

ko's resignation and Exhibits B and E attached to Mr. Mackle's supplemental affidavit are indicative of this. The court makes no finding as to the type or extent of such changes and expressly withholds any opinion as to whether or not they were of the kind alleged in plaintiffs' amended complaint.

Subsequent to the acceptance of Boyko's resignation on April 8, 1957, and sometime in or about July, 1957, the exact date being unknown, the activities on which the present case is predicated began.

There has been no showing that during Boyko's employment as general counsel for C.E.A. prior to April 6, 1957, he received or had access to secret or confidential information related to the issues in the present case.

The court concludes that C.E.A., to date, has failed to establish that there is a "substantial relationship" between the issues in the present case and the subject matter of Boyko's former representation. The motion to disqualify is denied.

If, as it seems at times, C.E.A.'s main concern is whether it can obtain a fair and impartial trial in the Anchorage community because of the controversies and litigation over the years with the City of Anchorage, during which time it was represented by Boyko, a motion under 28 U.S.C.A. § 1404, supported by a proper showing, would perhaps be appropriate.

The court is under the impression that all counsel are agreed that Boyko's disqualification should be finally determined before going forward with discov-

ery or other proceedings. Because of the decisions in *Cord v. Smith,* 338 F.2d 516 (9th Cir. 1964); *Fleischer v. Phillips,* 264 F.2d 515 (2d Cir. 1959); and *Marco v. Dulles,* 268 F.2d 192 (2d Cir. 1959), the court feels that it cannot in good faith certify this question for an immediate appeal under the provisions of 28 U.S.C.A. § 1292(b). However, all proceedings in this case will be stayed until the further order of the court to afford C.E.A. an opportunity to attempt to appeal or to file a petition under the All Writs Act, 28 U.S.C.A. § 1651. See *Cord v. Smith, supra.*

Dated: Oct 29 1965

Raymond E. Plummer
United States District Judge

Copies mailed to:
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Filed October 29, 1965

Appendix B

In The United States Court of Appeals
For the Ninth Circuit

Chugach Electric Association, a corporation, Petitioner, vs. U. S. District Court for the District of Alaska, and Hon. Raymond E. Plummer, U. S. District Judge, Respondents.	No. 20,568

REPLY TO PETITION FOR WRIT OF MANDAMUS

STATEMENT OF FACTS

Edgar Paul Boyko, for purposes of brevity hereinafter referred to as Boyko, was corporation counsel for C.E.A. from October 1, 1954, to March 31, 1956. On July 1, 1956, Boyko was employed in a consulting capacity to supervise and have charge of the law business of C.E.A. and agreed to represent C.E.A. in all matters referred to him. On April 6, 1957, Boyko submitted his resignation and at a special meeting of the board of directors held on April 8, 1957, it was decided by a majority vote that his resignation be accepted immediately and his monthly retainer be paid for April, May and June of 1957.

On April 7, 1965, Boyko, as counsel for the plaintiffs, caused to be filed in the district court for the dis-

trict of Alaska an action alleging anti-trust violations, breach of contract, intentional destruction of business and fraud. The action was entitled John Roderick, as Trustee in Bankruptcy of Mrak Coal Company, a corporation in Reorganization Under Chapter X of the Bankruptcy Act, William Mrak and Eleanor Mrak, Plaintiffs, v. Chugach Electric Association, an electric cooperative, Placer Development, Limited, a Canadian corporation, and Evan Jones Coal Company, a corporation, Defendants, Civil Action No. A-35-65. The action is predicated on matters, acts, transactions and occurrences that took place or occurred after Boyko's employment as counsel for C.E.A. had terminated.

Defendant C.E.A. moved to disqualify Boyko on the ground that his representation of plaintiff in the district court case against C.E.A. was in violation of Canons 6 and 37 of Canons of Professional Ethics of the American Bar Association.

C.E.A.'s motion to disqualify Boyko was denied by order of the district court entered October 29, 1965, for the reasons stated in a memorandum of decision entered on that date. C.E.A. filed in this court its petition for leave to file petition for writ of mandamus and an order granting the petition was entered on December 13, 1965.

STATEMENT OF RESPONDENTS

The district judge feels that it would be improper for him to assume the role of a partisan in an attempt to justify or defend the memorandum of decision and order entered on October 29, 1965. If the decision and

order is correct it should stand. If the findings of the district court are clearly erroneous or its conclusions contrary to law, the decision and order should be vacated and a writ of mandamus should issue.

There are, however, several matters mentioned in petitioner's memorandum which the district judge would like to clarify. Petitioner, in its memorandum at page 16, states in part as follows:

> The memorandum decision takes "judicial notice" of certain matters without explaining their impact on the decision and then simply concludes at page 5:
>
> > "There has been no showing that during Boyko's employment as general counsel for C.E.A. prior to April 6, 1957, he received or had access to secret or confidential information related to the issues in the present case."

In addressing the court in argument William J. Moran, Esq., local counsel for Chugach Electric Association, stated:

> But Your Honor knows it's certainly a matter of very common knowledge to any of us in this community for any number of years, that the continuing legal and other problems of Chugach Electric Association was a matter of great public discussion for a period of time, and unfortunately that period is not completely ended, during which one could hardly pick up a local newspaper, turn on a local radio, or view local television concerning itself with the news without hearing some reference to disputes involving Chugach Electric Association, and more frequently than not, the city of Anchorage. (Transcript of proceedings held on June 11, 1965, page 39.)

Mr. Moran's statement is factually correct and the district court in its memorandum of decision, in agreement with Mr. Moran's statement, found as a fact that the affairs of C.E.A. during the material period of time were a matter of very common knowledge to persons in the Anchorage area.

What the district judge was attempting to express was the fact that throughout the material period of time the majority members, supported by management, and the minority members were striving to embarrass and expose each other by publicizing the affairs of C.E.A. This resulted in a situation where the affairs of C.E.A., internal and otherwise, were very much a matter of common knowledge to persons in the Anchorage area and no secrets or confidences existed within the association during that period of time.

Petitioner's memorandum, at page 17, states in part as follows:

> The above quoted conclusion is contrary to the record in this matter and is apparently based upon the erroneous view (argued by Mr. Boyko) that Petitioner must reveal the specific confidential information which Mr. Boyko received or had access to.

It is the district judge's understanding from a reading of the portions of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, quoted on pages 18 and 19 of petitioner's memorandum, that the same pertain only to secrets which have been divulged and confidences which have been entrusted by the client to the attorney.

It is also the district judge's understanding from the cases cited and the arguments made by learned counsel that the rule of law established by the authorities may be stated generally to be that where any "substantial relationship" can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter representation will be prohibited. If such a "substantial relationship" is shown, there need be no further showing of actual confidences and actual prejudice; such will be assumed.

Petitioner, in its memorandum at page 22, states in part:

> The court below made no attempt in its memorandum decision to resolve any questions of creditability as to those matters where there was a conflict between the affidavits.

The district judge was of the opinion that the conclusions set forth in his memorandum of decision made it plain that where there was a conflict between the affidavits filed by Mr. Mackle and Mr. Boyko, the court had elected to believe the factual statements contained in the affidavit and supplemental affidavit filed by Mr. Boyko.

In weighing and considering the affidavit and supplemental affidavit filed by Mr. Mackle, the district judge took into consideration his interest in the motion before the court and the outcome thereof, and his motive in submitting the affidavits. The judge took into consideration the fact that from March 12, 1955, until a short time prior to April 8, 1957, when Mr.

Boyko's resignation was accepted, Mr. Mackle had been one of the anti-management board members who considered the vote of the membership at the 1957 election to be a "mandate to fire Boyko".

The district judge gave some consideration to the fact that the affidavits were submitted by Mr. Mackle when Marlin S. Stewart, who was the general manager of C.E.A. from its commencement until sometime after April 8, 1957, and is presently a member of the board of directors of C.E.A., and Richard B. Smith, the present secretary of the board who has been a board member since prior to April 8, 1957, were available for the signing of such affidavits.

In connection with the affidavits filed by Mr. Mackle and Mr. Boyko, the district judge also considered the probability or improbability of the statements contained therein in the light of conditions and circumstances which existed with reference to the affairs of C.E.A. and which were a matter of common knowledge in the Anchorage area during the material period of time. After doing so, the district judge concluded that it was inherently improbable that the matters alleged in the amended complaint and matters substantially related thereto, if in fact such occurred, came into existence until after the 1957 election of C.E.A.

Accordingly, where a conflict existed between the respective affidavits, the district judge accepted as true the factual statements appearing in the affidavits filed by Mr. Boyko.

/s/ Raymond E. Plummer,
Raymond E. Plummer, Respondent

Appendix C

United States Court of Appeals
For the Ninth Circuit

Chugach Electric Association, a corporation, Petitioner, vs. United States District Court for the District of Alaska at Anchorage and the Honorable Raymond E. Plummer, Judge, Respondents.	No. 20,568

[December 22, 1966]

On Petition for Writs of Mandamus and Prohibition

Before: MERRILL, BROWNING and DUNIWAY, Circuit Judges

MERRILL, Circuit Judge:

Petitioner is defendant in an action before respondent court brought by the trustee in bankruptcy of Mrak Coal Company. Petitioner moved to disqualify the trustee's attorney, Edgar Paul Boyko, on the ground of conflict of interest contrary to the Canons

of Ethics.[1] The motion was denied by respondent court. That ruling not being appealable, *Cord v. Smith,* 338 F.2d 516 (9th Cir. 1964), petitioner brought this proceeding for a writ of mandamus directing the disqualification under 28 U.S.C. § 1651 (1964).

We here rule that disqualification is required. The decision is regretfully reached since an actual conflict of interest is not clearly established and from a study of the record we are satisfied of Mr. Boyko's good faith in resisting disqualification. Nevertheless, we conclude that this is a case in which an attorney must, at the instance of the adversary, his former client, stand aside.

Petitioner generates and sells electrical power in south central Alaska. Mr. Boyko served as its general counsel from October 1954 to April 1956 and subse-

---

[1]Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, adopted by the Supreme Court of Alaska in 1963:

"6. **Adverse Influences and Conflicting Interests.**

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

"37. **Confidences of a Client.**

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his emloyees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

quently served as consultant from July 1956 to April 1957.

The action brought by Mrak's trustee with Mr. Boyko as counsel charges petitioner with violations of the federal antitrust laws in efforts to retain its monopoly position as the sole company in the area engaged both in the generating and sale of electrical power. It is alleged that Mrak's bankruptcy resulted from these violations.

The trustee alleges that petitioner's monopoly position was threatened by the plans of another power retailer, Matanuska Electric Association, to acquire its own generating facilities; that petitioner conspired to deprive Matanuska of its source of coal by destroying the two principal coal suppliers, Mrak and Evan Jones Coal Co.; that a part of its scheme was to maneuver Mrak into a position of economic dependence on petitioner and then destroy Mrak by withdrawing its support and switching to natural gas as fuel.

Further background is recited in the opinion of the District Court:

> "Over a period of time a very definite cleavage developed among the [Chugach] Board members. This eventually resulted in four Board members being strongly pro-management and three Board members anti-management. Both groups were vigorous and publicly vocal in their criticism of the other group and in advocating their respective positions.
>
> "For a period of at least several years the open and public disputes between the Board members

and the efforts of the majority members to remain a majority and the efforts of the minority members to become the majority resulted in many public statements and discussions. As a result the annual meeting and election of directors of C.E.A. was a matter of general interest to those residing in the Anchorage area.

* * * * *

"At the annual meeting and election of C.E.A. in 1957 the anti-administration forces succeeded in electing a majority of the Board and the principal officers of the corporation.

"Inasmuch as Boyko had been in direct conflict with the advocated programs and policies of what had theretofore been a minority of the Board and subsequent to the election became a majority, he, on April 6, 1957, submitted his resignation."

The court concluded:

"Subsequent to the acceptance of Boyko's resignation on April 6, 1957, and sometime in or about July, 1957, the exact date being unknown, the activities on which the present case is predicated began.

"There has been no showing that during Boyko's employment as general counsel for C.E.A. prior to April 6, 1957, he received or had access to secret or confidential information related to the issues in the present case.

"The court concludes that C.E.A., to date, has failed to establish that there is a 'substantial relationship' between the issues in the present case and the subject matter of Boyko's former representation. The motion to disqualify is denied."

In our view the District Court's findings and conclusions do not reach the heart of the problem. In their prohibition of conspiracies the antitrust laws are concerned not only with what was done but with why it was done. The problem here is not limited to the question whether Mr. Boyko was connected with petitioner as its counsel at the time agreements were reached and overt acts taken,[2] but includes the question whether, as attorney, he was in a position to acquire knowledge casting light on the purpose of later acts and agreements. The policies of the new board majority, pursuant to which the alleged violations occurred, presumably reflected the expressed views and attitudes of the old minority. Antitrust views and attitudes are not likely to be expressed in open meeting or public debate, and public airing of the board's cleavage does not eliminate the probability that information respecting purpose and expectation, available to the company attorney, was not made public.

A likelihood here exists which cannot be disregarded that Mr. Boyko's knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery. This likelihood is en-

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[2]Even upon this question the record raises doubts. In his original complaint the trustee alleged a 1956 agreement between petitioner and Evan Jones, pursuant to which Evan Jones during that year ceased buying coal from Mrak and refrained from bidding against Mrak on a lucrative contract with petitioner, thus initiating the program by which Mrak's dependence on petitioner was to be accomplished. In his amended complaint, filed after petitioner had moved to disqualify Mr. Boyko, the trustee eliminated all reference to the 1956 agreement and events.

hanced by recognition of the fact that the allegations of a complaint are not always an accurate appraisal of the relevant period of time in antitrust cases. Discovery and trial proof frequently introduce ramifications rendering earlier events relevant.

The petitioner does not have the burden of specifying the secret and confidential information which was available to Mr. Boyko. Such specification might entail disclosure of the very confidences the Canons seek to protect. It must be remembered that the attorney in such situations as this does not have the shelter enjoyed by a defendant whose adversary must meet a burden of proof. Where conflict of interest or abuse of professional confidence is asserted, the right of an attorney freely to practice his profession must, in the public interest, give way in cases of doubt.

The District Court is directed to set aside its order denying petitioner's motion to disqualify Edgar Paul Boyko, and to enter an order of disqualification.

SUPREME COURT, U.S.
JUN 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1359~~ 132

JOHN RODERICK,
as Trustee of Mrak Coal Company,
WILLIAM MRAK and ELEANOR MRAK,
the Real Parties in Interest,
Petitioners,

v.

CHUGACH ELECTRIC ASSOCIATION,
a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

JOHN RODERICK, as Trustee of Mrak Coal Company, WILLIAM MRAK and ELEANOR MRAK, the Real Parties in Interest,
Petitioners,

v.

CHUGACH ELECTRIC ASSOCIATION, a Corporation,
Respondent.

No. 1359

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF JURISDICTION

Petitioners have requested this court to review, pursuant to 28 U.S.C. §1254(1), the decision of the Ninth Circuit in this case (*Chugach Electric Association v. United States District Court for the District of Alaska, et al.*, 370 F.2d 441 [1966]). That decision disqualified Edgar Paul Boyko, respondent's former general counsel, and his firm from representing petitioners (hereinafter sometimes called "MRAK") in a $6,000,000.00 antitrust suit against respondents (hereinafter sometimes called "CEA").

Petitioners assert a conflict of decision between this decision and those of several other circuit courts of appeal. This assertion is based upon a totally unjustified and inaccurate characterization of the Ninth Circuit's decision.

The authorities which petitioners seek to establish as

being in conflict with the Ninth Circuit's decision are those upon which respondent argued the matter before the Ninth Circuit. The Ninth Circuit's decision shows no disposition to depart from those precedents. To the contrary, the Ninth Circuit's decision is in full harmony: with its own prior decisions; with the decisions of other circuits and federal district courts; with the standards established by the Supreme Court of Alaska, in which state the case will be tried; and with the interpretations of the Canons of Professional Ethics by the American Bar Association.

The Ninth Circuit did not establish a *per se* rule for antitrust cases. It did, however, as it must, consider the nature of the litigation, its issues and their proof, in evaluating the relationship between the present litigation and the access to confidential information Mr. Boyko enjoyed while he was respondent's general counsel. The Ninth Circuit also, of course, recognized that any doubt must be resolved against the attorney whose disqualification is sought.

The parties had presented the issue by affidavits and exhibits.[1] Faced with a record that compelled the conclusion and a trial court decision that had not fully dealt with the issues (but had proceeded on the basis of invalid conclusions from inaccurate "judicial notice"), the Ninth Circuit, by unanimous decision of three justices, found a relationship between Mr. Boyko's former representation of respondent as its general counsel and the present litigation that required Mr. Boyko's disqualification.

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1. Petitioners at no time prior to filing their Petition for a Writ of Certiorari indicated any desire to present any further evidence.

Question to Be Considered

The only matter being raised by the Petition for Writ of Certiorari is the Ninth Circuit's factual evaluation that Mr. Boyko should be disqualified from further appearance in this litigation against his former client.

COUNTERSTATEMENT OF FACTS

The petition for a writ of certiorari involves the disqualification of petitioners' attorney in an antitrust treble damage action under Sections 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1, 2 and 3). The plaintiffs-petitioners, the Trustee in Bankruptcy for MRAK Coal Company and two individual stockholders, are seeking to recover in excess of $6,000,000.00 from respondent and two other defendants. The original complaint was served on April 8, 1965, and after the first argument on the motion to disqualify Mr. Boyko, petitioners filed an amended complaint (R., Vol. 2, pp. 4-32; Vol. 3, pp. 192-205).

1. The General Nature of Mr. Boyko's Former Relationship With Respondent

The attorney for the petitioners, Mr. Edgar Paul Boyko, was formerly corporation counsel for respondent from 1954 through 1957. Throughout this period Mr. Boyko actively represented respondent as its general legal counsel (R., Vol. 3, pp. 111-125, 132-134).

Throughout this representation of respondent (sometimes hereinafter referred to as "CEA"), it is undisputed that Mr. Boyko:

> ". . . was ultimately responsible for the representation of CEA in all of its many and varied legal problems and in advising CEA on all aspects of its

> business. Throughout that period, Mr. Boyko was present at Board of Directors meetings and took an active part in the many discussions held at those meetings. In carrying out his duties with CEA, Mr. Boyko familiarized himself with the complete operation of all CEA facilities, the administrative workings of the corporation, and the relationships and transactions between CEA and its suppliers, customers and other parties with which it has business dealings. This included full familiarization with the relations between CEA and MEA, the relations between CEA and Evan Jones Coal Company, and the relations between CEA and the plaintiff Mrak Coal Company, including the contracting for and commencement of coal purchases from MRAK in *1956* . . .
>
> "In addition, throughout this period, Mr. Boyko had full and complete access to the books, records, personnel, meetings and confidentialities of the corporation." (R., Vol. 3, pp. 114-115)

This was admitted by Mr. Boyko (R., Vol. 3, p. 173), and he stated to the trial court:

> ". . . I knew as much concerning Chugach Electric's business as any lawyer will ever know about the business of a corporate client. There is no question about it, . . ." (R., Vol. 4, p. 47)

Mr. Boyko's resignation was accepted by respondent on April 6, 1957, although his retainer fee continued to be paid through June 30, 1957, and he retained respondent's files (R., Vol. 3, p. 223). Mr. Boyko acknowledged retention of respondent's files, but asserted that he returned some of them at an unstated time after his resignation (R., Vol. 3, p. 258).

According to Mr. Boyko's sworn statement, he even performed legal services for CEA (respondent) after April 7, 1957 (asserted to be non-compensatory — except, of course, for the retainer fees for April, May and June—but

nonetheless an attorney-client relationship) (R., Vol. 3, p. 258).

2. The Allegations of the Complaints and Mr. Boyko's Relation Thereto

With this background in mind, we must now turn to the various allegations of the complaints and the affidavit statements of Mr. Mackle and Mr. Boyko relating thereto.

A. *Motivation and Object of the Alleged Conspiracy*

The original complaint alleged that the motivation for the alleged conspiracy scheme was to "insure that CEA would *maintain* [emphasis supplied] its position as the sole seller of retail electric power owning its own power generating facilities," which allegedly gave CEA monopoly power in South Central Alaska (Complaint, par. 13; R., Vol. 2, p. 12). Inasmuch as the complaint alleged that the conspiracy commenced "in or about 1957" for the purpose of protecting pre-existing monopoly power—it places the existence of this alleged monopoly power of CEA back prior to 1957, when Mr. Boyko was CEA's corporate counsel (R., Vol. 3, pp. 111-125, 132-134).

The Amended Complaint alters the allegations of the original paragraph 13 in the following respects: (a) it alleges that the scheme to protect the pre-existing monopoly power arose "in or after July, 1957"; and (b) adds a reference to maintaining the competitive position it enjoyed after the construction of its Cooper Lake Hydroelectric facility (Amended Complaint, para. II; R., Vol. 3, pp. 193-194).

The prime object of the alleged conspiracy was alleged to be the elimination of the "long standing plans of MEA

to construct its own power generating facility in the heart of the coal producing region in the Matanuska Valley; the so-called 'mine-mouth project'" (Complaint, par. 15; R., Vol. 2, p. 13). The Amended Complaint made no substantial alteration in these allegations, but merely: (a) changed "long standing plans" to "proposed plans"; and (b) added an assertion that the mine-mouth project "appeared close to fruition during the years 1962-64."[2]

Mr. Boyko admits that he fully familiarized himself with the relationship between CEA and MEA (R., Vol. 3, pp. 115, 174; R., Vol. 3, p. 252).

> ". . . There is no question but that MEA had long standing plans for a mine-mouth power plant and it is quite possible that such plans existed in whole or in part during the time that Mr. Boyko was counsel for CEA. . . ." (R., Vol. 3., p. 251)

The Supplemental Affidavit of Terrence G. Mackle also established that:

> ". . . Mr. Boyko had full access to and obtained confidential information with respect to the relationship between CEA and MEA, including various attempts to reach acceptable cooperative arrangements for the construction of future power generating facilities and the impact, if any, upon CEA of any MEA proposal to construct its own power generating facilities." (R., Vol. 3, pp. 222-223)

At first glance, Mr. Boyko's Supplemental Affidavit (R., Vol. 3., pp. 261-262), appears to deny Mr. Mackle's statement. In fact, however, it quickly appears upon careful

2. The reference to "close to fruition in 1962-64" is strictly a red herring which does not alter the substance of the allegations or the prior long standing nature of these plans. This is obvious, when one considers that purpose of the allegation is to set out the object of the alleged conspiracy, as to which both the Complaint and Amended Complaint allege overt acts as early as 1956 and 1957, respectively (R., Vol. 2, pp. 14-16).

reading that Mr. Boyko is only denying *receipt* of confidential information *from MEA* because of an adversity of interests between MEA and CEA while he was CEA's counsel. Mr. Boyko's affidavits do *not* deny that he had access to confidential information of CEA concerning the known proposed plans of MEA to construct a mine-mouth project. The affidavits do not even directly deny actual receipt of such confidential information of CEA. Of course, it is confidential information of CEA (which could take the form of studies, analysis, etc.) concerning the MEA project for which protection is sought—not confidential information of MEA.[3]

B. *Alleged Necessary Factors and Overt Acts of the Alleged Conspiracy*

Paragraphs 19 and 20 of the original Complaint alleged:

> "19. . . . CEA entered into an unlawful combination and conspiracy with the defendants EVAN JONES and PLACER . . . *the substantial terms of which combination and conspiracy were* as follows:
>
> "(a) MRAK, which prior to 1957 had not supplied any coal to CEA, *would be encouraged to enter into a coal supply arrangement with CEA*, and pursuant to this aim, *EVAN JONES*, which had formerly purchased coal from MRAK, *would cease making such purchases*.
>
> "20. For the purpose of carrying out the aforesaid unlawful combination and conspiracy . . . they *con-*

3. The briefs and affidavits on behalf of Mr. Boyko adopted a familiar tactic: if you can't deny what has been said, deny something else that sounds similar and argue as though they were the same. Thus, while the affidavits of Mr. Mackie directly allege that Mr. Boyko had access to confidential internal information of respondent concerning the relationships between respondent and MEA and MRAK and the impacts of their activities upon respondent, Mr. Boyko never denies this. Mr. Boyko's affidavits and the briefs on his behalf instead devote themselves entirely to denying receipt of such confidential information as MEA and MRAK may have had. This tactic will be noted again in regard to other allegations.

spired to do, and *pursuant thereto* have undertaken the following, among other, *overt acts*:

"(a) *Prior to 1957,* EVAN JONES discontinued making purchases of coal from MRAK . . .

"(b) Beginning in 1957 [sic], *CEA commenced purchasing coal from MRAK. . . .*" (Emphasis supplied) (R., Vol. 2, pp. 14-15)

The inception of the alleged conspiracy must obviously predate the commitment of overt acts "pursuant thereto." The Complaint therefore established the inception of the alleged conspiracy as prior to 1957 (since EVAN JONES discontinued purchases pursuant to the conspiracy) and prior to CEA's announcement of purchases from MRAK.

The affidavit of Mackle establishes that Mr. Boyko was retained as counsel for CEA in 1954 through a substantial part of 1957, and that CEA commenced purchasing coal from MRAK in 1956, while Mr. Boyko was CEA's corporate counsel, and that the first coal contract with MRAK had been prepared under the auspices of Mr. Boyko (R., Vol. 3, pp. 115, 136-140). Mr. Boyko's affidavit did not deny these statements by Mr. Mackle but admitted they were "substantially true" (R., Vol. 3, p. 173).

One assumes that competent counsel normally prepares a $6,000,000.00 antitrust complaint with great care and deliberation.

After these matters were brought to Mr. Boyko's attention by a motion to disqualify him, he immediately amended paragraphs 19 and 20 of the Complaint to read:

"19. . . . CEA entered into an unlawful combination or conspiracy . . . the substantial terms of which combination and conspiracy were as follows:

"(a) MRAK, which had been supplying coal to

CEA for a short time, would be encouraged to enter into a series of coal supply arrangements with CEA, *in the fall of 1957*. . . ."

• • •

"20. For the purpose of carrying out the aforesaid unlawful combination and conspiracy . . . they conspired to do, and pursuant thereto have undertaken the following, among other, overt acts:

"(a) *Commencing in the fall of 1957* and taking advantage of the fact that EVAN JONES had discontinued making purchases of coal from MRAK, thereby forcing MRAK to look for other markets, CEA entered into two successive contracts, covering the period from the fall of 1957 to the fall of 1962, at prices so favorable to MRAK, that MRAK had become substantially dependent upon making sales to CEA. . . ." (Amended Complaint, paragraphs IV and V, emphasis supplied; R., Vol. 3, pp. 195-197).

Mr. Mackle's Supplemental Affidavit, paragraph 3(g), states that:

". . . Mr. Boyko had full access to and obtained confidential information relating to the following: (1) the first coal supply contract entered into between MRAK and CEA on August 28, 1956 . . .; (2) the contractual relationships between CEA and MRAK; and (3) the matters preceding and leading to consummation of the second coal contract between MRAK and CEA dated September 1, 1957." (R., Vol. 3, pp. 224-225)

Mr. Boyko's Supplemental Affidavit, paragraph 8(g), in response merely denies: recollection of having anything to do with the first coal contract; and denies receipt or access to confidential information after his termination as CEA's corporate counsel (R., Vol. 3, p. 263). This affidavit does *not* in any way deny:

(1) Having access to and receipt of confidential information while CEA's attorney relating to the then exist-

ing and contemplated contractual relationship between CEA and MRAK; and

(2) Having access to and receipt of confidential information while CEA's attorney relating to the matters preceding and leading to consummation in the fall of 1957 of the second coal contract between MRAK and CEA — the consummation of which is alleged in the Amended Complaint (paragraph 20(a)) to be a specific overt act pursuant to an alleged pre-existing conspiracy.

In regard to amended paragraph 20(a), Mr. Mackle's Supplemental Affidavit states:

> ". . . that Mr. Boyko had full access to and obtained confidential information with respect to the fact that MRAK was, as early as 1956, looking for other markets and did, in fact, enter into a one-year coal supply contract with CEA on August 28, 1956 . . ." (R., Vol. 3, p. 225)

Mr. Boyko at first glance might appear to deny this statement, but in fact evades any direct confrontation and apparently, upon careful reading, is merely denying receipt from and access to confidential information *of MRAK* because he was not then in a confidential relationship with MRAK (R., Vol. 3, p. 264).[4]

C. *Dependency of Evan Jones on Coal Purchase by CEA*

An integral part of the alleged unlawful scheme of CEA, was the subsequent elimination of Evan Jones. In

4. Mr. Boyko also, for the first time, denies the 1956 coal contract between CEA and MRAK was prepared under his auspices and general direction. Previously Mr. Boyko had admitted it to be "substantially true" and denied any recollection of the matters. Mr. Boyko's subsequent denial is inconsistent with his admitted responsibilities and action as CEA's counsel.

this regard, paragraph 16 of the Complaint (even as amended) states:

> ". . . EVAN JONES, although financially stronger (than MRAK), operated extensive coal producing facilities and was dependent upon the continued existence of demand for coal from two major customers, CEA and the Department of Defense, each of which used coal to generate electric power." (R., Vol. 2, p. 13)

Mr. Mackle's Supplemental Affidavit states that:

> ". . . Mr. Boyko had full access to and obtained confidential information relating to the dependency of Evan Jones, if any, upon coal purchases from CEA, which coal purchases terminated in 1956 while Mr. Boyko was employed as CEA's attorney." (R., Vol. 3, p. 224)

Mr. Boyko's Supplemental Affidavit does *not* in any way deny having access to and obtaining such confidential information. Mr. Boyko only denies any connection with the alleged conspiracy or alleged overt acts during and after 1960. (R., Vol. 3, p. 263)[5]

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5. It must be remembered that even the Amended Complaint places the first specifically alleged overt act in the fall of 1957 and therefore dates the inception of the alleged conspiracy prior to that time.

The Petition for Writ of Certiorari asserts without reference to the pleadings (as did the briefs below) that the original and amended complaints allege causes of actions based solely on contracts entered into "in 1960" (Petition, p. 19). As this Counter-Statement of Facts clearly demonstrates, this assertion is totally at odds with the pleadings themselves. We believe this is further emphasized by the fact that the affirmative allegations of both the original and amended complaints undisputably show that there was no contract between MRAK and respondent executed *in 1960* (R., Vol. 2, pp. 4-32; Vol. 3, pp. 192-205). Indeed, neither complaint ever mentioned any date in 1960 or contains any implied reference to any acts allegedly taking place in 1960. This date, around which the argument for Mr. Boyko is made, is purely a creation of Mr. Boyko's advocacy. There are, however, numerous specific and implied allegations in these complaints [as distinct from Mr. Boyko's assertions] that date back to the period of Mr. Boyko's representation of respondent.

Paragraph 28, by realleging paragraphs 20(a) and (b), alleged the exercise of monopoly power and deliberate exclusionary acts prior to 1957 (R., Vol. 2, p. 23-24). Thus the original complaint clearly alleged the existence and unlawful use of monopoly power by CEA while Mr. Boyko was CEA's corporate counsel.

When the above matters were pointed out, Mr. Boyko amended paragraph 26 to read:

> "26. CEA presently possesses and has possessed for a number of years, commencing with the construction of its own hydro-electric power generation at Cooper Lake, and the abandonment of plans for sharing its generating resources with other distributors by means of a generation and transmission cooperative [referred to as occurring in 1958] . . . monopoly power. . . ." (R., Vol. 3, p. 201-202)

The Cooper Lake Project and the disintegration of the generating and transmission cooperative (Central Alaska Power Association, hereinafter referred to as "CAPA") are not only alleged to be crucial points in the inception of the alleged monopoly power of CEA, but are also alleged as the crucial aspects of the alleged dominant position of CEA with respect to which Mr. Boyko asserts that CEA *by* 1957, devised a scheme and plan to continue (R., Vol. 3, p. 193).

Yet, as is clearly established by the Supplemental Affidavit of Terrence G. Mackle, the plans for the construction of the Cooper Lake facilities, the impact of the Cooper Lake Project, and the operation and disintegration of CAPA were all matters which arose while CEA was under the guidance of Mr. Boyko as their general counsel. Said affidavit states:

". . . Mr. Boyko had full access to and obtained confidential information with respect to: (1) the acquisition of CEA of a preliminary permit from the Federal Power Commission for the construction of the proposed Cooper Lake Project; (2) the plans and financing for the proposed Cooper Lake Project; (3) the formation and operation of the proposed generation and transmission co-operative (Central Alaska Power Association, hereinafter referred to as CAPA); (4) all matters leading to the withdrawal of MEA from CAPA by resolution of MEA dated November 5, 1956, a copy of which is attached hereto as Exhibit "A" and by this reference incorporated herein; (5) matters relating to CEA's dissatisfaction with CAPA; and (6) the history, policy and reasons leading to CEA's ultimate withdrawal from CAPA. This affiant further states that ultimately CEA formally withdrew from CAPA by motion dated May 8, 1957, a copy of which is attached hereto as Exhibit "B", and by this reference incorporated herein, at a time when Mr. Boyko was still receiving salary as CEA's attorney and at a time when Mr. Boyko was retaining CEA's files in his possession pending the payment of his fees through July 1, 1957. . . ." (R., Vol. 3, pp. 223-224)

Since the complaint alleges that the basic party against which the alleged conspiracy and monopolization was aimed was MEA, MEA's conduct while in CAPA, its voluntary withdrawal in 1956, and its relationship with CEA during this period will obviously become involved in this litigation in a major way. It is undisputable that Mr. Boyko had access to CEA's files and confidentialities in regard to these matters.

Mr. Boyko has admitted great familiarity with all of the matters mentioned by Mr. Mackle as a result of his relationship with CEA as its counsel (R., Vol. 3, p. 252).

Mr. Boyko, in his Supplemental Affidavit (R., Vol. 3,

p. 262) does *not*, in any way, deny access to, and having obtained, confidential information relating to items (1) through (4) of paragraph 3(e) of Mr. Mackle's Supplemental Affidavit—he merely states that he does feel such information has no bearing on the issues (compare with his admission, quoted in subsection E, below, pp. 14-15, that the matters to which such confidential information relates with be *material and are of importance* in establishing unlawful overt acts).

Mr. Boyko does *not* directly mention or deny the statement that he had access to and obtained confidential information relating to the history, policy and reasons leading to CEA's ultimate withdrawal from CAPA (R., Vol. 3, p. 262).

Mr. Boyko also amended paragraph 28 of the Complaint so that it now alleges, by realleging amended paragraph 20(a), that the consummation of the contract with MRAK in 1957 was an unlawful exercise of monopoly power and a deliberate exclusionary act—thus placing the inception of the alleged monopoly power prior to the fall of 1957, while Mr. Boyko was attorney for CEA (R., Vol. 3, p. 202).

D. Boyko's Admission That Matters Arising While He Was Counsel for Respondent Are Material and Important to the Litigation

Mr. Boyko, in a brief to the trial court, admitted that:

> "The economic posture and status of CEA during the time Mr. Boyko was its attorney (i.e., prior to April 6, 1957), including factors such as its corporate structure, resources, generation and transmission facilities, relative position in the Alaska power in-

dustry, the proposed Cooper Lake project and the formation of CAPA, etc., were all matters of common knowledge. . . . *Such factors will become material to this lawsuit.* . . . Although preliminary matters, *they are of importance to establish the basis for proof of overt* unlawful acts. . . .' (R., Vol. 3, p. 244) (Emphasis supplied)

ARGUMENT

1. The Lower Court's Action

The trial court's opinion concluded it had not been shown that Mr. Boyko had received or had access to confidential information relating to the issues in the present case (R., Vol. 3, p. 276). It is clear from the opinion and from the trial court's subsequent "Reply to Petition for Writ of Mandamus," that the trial court reached this conclusion not from an analysis of the facts before it, but on the basis of "judicial notice" of certain "facts" and deductions therefrom (R., Vol. 3, p. 273-276; R., Vol. 1, Reply to Petition for Writ of Mandamus, p. 4). Respondent, before the Court of Appeals, challenged the propriety and accuracy of this "judicial notice," and the invalid conclusion the trial court reached on this basis.

The trial court in its opinion purported to take "judicial notice" of the following:

(a) Respondent and the City of Anchorage had certain disputes and litigation relating to areas of service, which were well publicized;

(b) That a cleavage developed on Respondent's Board of Directors and that both sides were publicly vocal in criticizing the other group and in advocating their position;

(c) That the disputes among respondent's directors produced many public statements and discussions resulting in a general interest in the election of directors;

(d) Respondent's affairs became newsworthy; and

(e) Respondent's affairs were publicly discussed and debated (Trial Court Opinion, R., Vol. 3, pp. 273-276). From the above, the trial court concluded that it was impossible for Mr. Boyko to have had access to any confidential information (R., Vol. 1, Reply to Petition for Writ of Mandamus, p. 4).

We disputed that the full scope of this "judicial notice," particularly as expanded by statements in the trial court's reply, is proper or consistent with the true facts. Additionally, however, we would like to point out that the matters of "judicial notice" in the Trial Court's Opinion also do not support its conclusion. This is perhaps best demonstrated by applying similar judicial notice to a different set of facts. We would like this court to take judicial notice of the following:

(a) Congress and the executive branch of the federal government have had a series of continuing disputes concerning the conduct of the war in Viet-Nam, which disputes have been widely publicized by all forms of mass media;

(b) A cleavage has developed in Congress between pro-administration and anti-administration factions, and both sides have been publicly vocal in cirticizing the other group and advocating their own position;

(c) These disputes have produced many public state-

ments and discussions, resulting in a general interest in the election of Congressmen;

(d) Congress' affairs have become newsworthy; and

(e) Congress' affairs have been publicly discussed and debated.

Now, would this court conclude, from the above, that a high-ranking, confidential Congressional employee (who had access to all Congressional records and Congressional personnel) could not possibly have had access to any confidential information? We do not think such a conclusion would be reached—yet, this is precisely what the lower court's opinion did and what the Court of Appeals rejected.

The statement by Mr. Moran, which the trial court refers to in its reply (R., Vol. 1, Reply to Petition for Writ of Mandamus, pp. 3-4) was made in the context of a reference to the public's widespread knowledge of Mr. Boyko's former association with Petitioner—as a result of numerous instances of widely publicized litigation (R., Vol. 4, pp. 38-39). It is a wide step from that to purporting to take judicial notice that it was impossible for Petitioner to have any confidences throughout the entire period of Mr. Boyko's representation. To conclude, because of the existence of some litigation with others and some disputes among Petitioner's directors as to certain policies and actions, that therefore every record, every study and every action and statement of all employees and directors—regardless of whether or not related to a matter then in dispute among directors—automatically became a matter of common public knowledge, is unjustified and contrary to actual fact.

The lower court, for the first time, in its reply (R., Vol. 1, Reply to Petition for Writ of Mandamus, pp. 6-7), explains that where a conflict between the affidavits of Mr. Mackle and Mr. Boyko existed, he credited Mr. Boyko. This, of course, does not explain how the trial court overcame those portions of Mr. Mackle's affidavits admitted by Mr. Boyko; those portions of Mr. Mackle's affidavits not denied by Mr. Boyko; conflicts between Mr. Boyko's affidavits and the pleadings; and conflicting statements made by Mr. Boyko himself.

The resolution of conflicting statements apparently was again based on erroneous "judicial notice" of the motives of Mr. Mackle and the reason he signed the affidavits instead of two other individuals.

Mr. Mackle signed the affidavits because he was the *one* person who had been on the Board of Directors continuously from 1955 to date. While he had disagreed with Mr. Boyko on certain policies and actions, he had never had any personal difficulties with Mr. Boyko (as did some of the other directors), he had not been up for re-election in 1957, and did not make the statement attributed to him by the court that he considered the election a "mandate to fire Boyko."

The lower court indicated that if Respondent's affidavits were to be believed, they should have been signed by Richard B. Smith (R., Vol. 1, Reply to Petition for Writ of Mandamus, p. 7). Such "judicial notice" was erroneous. Mr. Smith obviously had insufficient knowledge to have signed the affidavits. Mr. Smith was first elected to the Respondent's Board of Directors on April 5, 1957, first participated as a director on April 8, 1957, and his

first action as a director was to vote in favor of accepting Mr. Boyko's resignation.

As for Mr. Stewart, although he was Respondent's manager for a period of time up to 1957, he did not become a director until 1961 and had no association with Petitioner for many years. Counsel for Respondent selected Mr. Mackle instead of Mr. Stewart for the valid and logical reason that Mr. Mackle had a complete continuity of association with Respondent, as a director, from 1955 to date.

The trial court, of course, had been presented with a difficult task because of the nature of Mr. Boyko's advocacy. There are many instances in the briefs and affidavits on behalf of Mr. Boyko where broad undocumented and unsupportable assertions were made; or where the complaints were inaccurately characterized; or where broad assertions from Mr. Boyko's affidavits were relied upon as though they superseded conflicting allegations of the complaints filed. This type of affidavit and argument is apparently the hallmark of Mr. Boyko's advocacy. *Gregoire v. National Bank of Alaska*, 413 P.2d 27 (Alaska Sup. Ct. April 7, 1966). Such advocacy and the manner in which the trial court had reached its decision, unfortunately, also cast a heavy burden upon the Court of Appeals to examine and analyze the pleadings and affidavits in detail. Inasmuch as the parties had elected to present the issue on affidavits and exhibits, the Court of Appeals was in as good a position to review the facts as had the trial court.

2. The Decision of the Court of Appeals for the Ninth Circuit

The disqualification of an attorney from appearing in

litigation adverse to a former client, is an issue which by its nature is best determined at the earliest possible time in the course of litigation so as to protect the interests of all parties—including those of the party whose attorney is being disqualified. *Cord v. Smith*, 338 F.2d 516 (9th Cir., 1964); *Gregoire v. National Bank of Alaska*, 413 P.2d 27 (Alaska, 1966). Mr. Boyko, himself recognized that a prompt determination of the issue would serve the best interests of his clients (R., Vol. 4, pp. 77-78). Indeed, Mr. Boyko's unsuccessful attempt in *Gregoire v. National Bank of Alaska*, 413 P.2d 27 at 36-37 (Alaska 1966) to use a delayed disqualification of his client's former attorney as a basis for reversing a trial court decision on the merits, underscored the need to determine Mr. Boyko's disqualification at this early state in the litigation.

In reaching its decision, the Court of Appeals examined: (1) the nature of the present litigation and the issues expressly and potentially involved, (2) the nature of Mr. Boyko's prior representation of the respondent; and the relationship between confidential information Mr. Boyko would have had access to during his representation of Respondent and the areas of issue and proof present in the existing litigation. 370 F.2d at 442-443. The Court of Appeals also recognized (1) that Respondents were not required to reveal specific confidential information in order to establish an actual conflict and (2) that in cases of doubt the attorney must be disqualified. 370 F.2d at 444. In so doing, it concluded that the record before it required Mr. Boyko's disqualification.

The decision of the Court of Appeals was fully consistent with: the canons of professional ethics and opinion

of the American Bar Association; prior federal court decisions; and the standards of professional ethics adopted by the Supreme Court of the State of Alaska (in which state this litigation arose and will be tried).

A. The Canons Involved

It is clear under these circumstances that Mr. Boyko's representation of the plaintiff in this case against CEA is in violation of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, which were adopted by the Supreme Court of Alaska in 1963, and which are applied by the federal courts Mr. Boyko must be disqualified from any further participation, direct or indirect, in this case, so long as CEA remains a party defendant.

Canons 6 and 37 state:

> "6. *Adverse Influences and Conflicting Interests.*
>
> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."
>
> "37. *Confidences of a Client.*
>
> "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employ-

ment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

The federal courts have repeatedly held that these canons prohibit conduct such as that involved in Mr. Boyko's representation of this plaintiff and require the disqualification of the attorney (and of the attorney's firm).

The Committee on Professional Ethics and Grievances of the American Bar Association has issued the following interpretation of these canons:

> "An attorney should not accept litigation against a former client, under any circumstances if it would result in conflict of interests or disclosure of confidences of the former client, and in such a situation a court is justified in enjoinging a lawyer from proceding with the litigation against the former client. Moreover, the attorney should avoid representation of a party in a suit against a former client when there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not in fact exist." Informal Opinion No. 885, Vol. 52 A.B.A.J. p. 428 (1966)

> "While an attorney may accept a case in which there is the possibility of liability ultimately falling on a past client, all parties must be completely satisfied with the representation and consent thereto after complete disclosure by the attorney of 'all circumstances of his relations to the parties and any interest in or connection with the controversy.' (Canon 6)." Informal Opinion No. 891, 52 A.B.A.J. p. 634 (1966) See also: Opinion No. 134, A.B.A.

B. The Ninth Circuit Decision in This Case Is Consistent With Other Federal Decisions

The Ninth Circuit had previously stated in disqualifying an attorney in *Cord v. Smith*, 338 F.2d 516 (1964):

". . . We think that the famous words of Judge Cardozo in *Meinhard v. Salmon*, 1928, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1, in which he was defining the duties of a trustee, are equally applicable to an attorney-at-law in relation to his conduct in the federal courts: 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.'" 338 F.2d at 524-525

Similarly, in *United States v. Trafficante*, 328 F.2d 117 (5th Cir. 1964) it was stated by the Fifth Circuit:

". . . It is not necessary, in order that disqualification result from a prior employment, that it be shown that the attorney acquired knowledge while representing the prior client which would operate to his disadvantage in the subsequent adverse representation. 5 Am. Jur. 297-298, Attorney at Law § 66.

"The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' 1 Thessalonians 5:22." 328 F.2d 120. (Emphasis supplied)

In *T.C. & Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D. N.Y. 1953) the court stated:

* * *

". . . Lawyers should not put themselves in the

position 'where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship.' In cases of this sort the court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6. In the instant case I think this can be said." (113 F. Supp. at 269)

The *T.C. & Theatre Corp.*, case was expressly cited with approval and quoted by the Second Circuit in *Consolidated Theatre v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954) where the court approved the disqualification of the plaintiff's attorney because as a result of his work for defendants on other litigation, he had *access* to the files of the defendant for a period relevant to the present litigation, even though there was no evidence of his obtaining specific confidential information. The court stated at page 927:

". . . Canon 6 is devised to protect the secrets and confidences reposed in the attorney by his clients. It is the work done for the client and the access to the confidential information of the client which is crucial in determining whether the obligation of Canon 6 arises. Regardless of whether Mr. Nickerson, concededly an attorney at law, was a law clerk or not, in the Schine and Griffith cases, which involved matters substantially similar to the instant case, he had access to the files of Fox and of the 'group' and he performed other services for the group—all defendants in the instant case—which might well have brought him into contact with confidential in-

formation. That was enough, we hold, to give rise to the obligation of Canon 6."

In *United States v. Standard Oil Company*, 136 F. Supp. 345 (S.C., N.Y. 1955), the court stated:

"Insofar as these canons relate to the question of the preservation of a former client's confidences, they disqualify an attorney who has received *confidences which might possibly be relevant to the controversy* at hand, as they seek to avoid unconscious as well as conscious betrayal.

"As to who must carry the burden of showing that relevant confidences were reposed, *an inference favorable to complainant has been reaffirmed recently in this Circuit. . . .*" 136 F. Supp. 353-354, (Emphasis supplied)

In *Harmar Drive-In Theatres, Inc. v. Warner Bros. Pictures*, 239 F.2d 555 (2d Cir., 1956), the Second Circuit adhered to these standards and disqualified an attorney on the basis of his former association with another law firm which had represented the defendant (although the attorney had not himself participated in the former representation).

See also: *Fisher Studio Inc. v. Loew's Incorporated*, 232 F.2d 199 (2d Cir., 1956), *cert. den.* 352 U.S. 836, 1 L.Ed.2d 55; *W. E. Bassett Company v. H. C. Cook Company*, 201 F. Supp. 821 (D. Conn. 1962), affirmed *per curiam*, 302 F.2d 268 (2d Cir. 1962); *Marco v. Dulles*, 169 F. Supp. 622 (S.D. N.Y. 1959). Compare also those cases which have adhered to these standards but upon a searching analysis of a very limited former representation have made a factual determination that no basis for disqualification existed: *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257 (9th Cir., 1964), *cert. den.* 380

U.S. 956 (1965); *Gajewski v. United States*, 321 F.2d 261 (8th Cir. 1963), issue raised for the first time by supplemental brief on appeal; *Shelley v. The Maccabees*, 184 F. Supp. 797 (E.D. N.Y. 1960)

C. The Ninth Circuit Decision Is Consistent With the Standards Established By the Alaska Supreme Court

In the recent decision of *Gregoire v. National Bank of Alaska*, 413 P.2d 27 (Alaska 1966), the Alaska Supreme Court dealt with the question of disqualifying an attorney at the request of his former client. Although Mr. Boyko participated in that case, it was his predecessor as counsel (Mr. Walton) that had been disqualified. That case involved the foreclosure of a mortgage, resisted on the allegation that the bank and its officers had conspired against the defendant and converted assets belonging to him. The bank filed a motion to disqualify Mr. Walton on the basis that he had prepared the mortgage for the bank. Mr. Walton denied that he had done so and alleged that he had prepared the mortgage as attorney for the defendant. The bank admitted it knew of no confidential information being received by Mr. Walton. The lower court indicated to Mr. Walton that it would disqualify him inasmuch as his continued participation would clearly lead the public to believe that a conflict of interests had been permitted. The Alaska Supreme Court affirmed the lower court, stating:

> ". . . Since it was not then known what testimony would be produced by appellants at a trial to substantiate their allegations, it could not be determined whether a conflict of interest might not develop during the trial which would require Mr. Walton to withdraw, if he was not in fact already disqualified.

> In addition, there was the question of propriety and the public image of the legal profession, as the judge pointed out.
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> "Instead of amounting to an abuse of discretion, we consider the trial judge's comments with respect to Mr. Walton's situation to be entirely appropriate. . . ." 413 P.2d at 39, 40.

In the course of approving the lower court's decision, the court quoted from *Wilson v. Wahl*, 182 Kan. 532, 322 P.2d 804 (1958), including the following statement:

> ". . . An attorney should avoid not only situations where a conflict of interest is actually indicated, but also those in which a conflict is likely to develop." 413 P.2d at 39.

Respondent feels that it was abundantly established that Mr. Boyko had access to confidential information relating to matters which will be material to this lawsuit and, therefore, it is adequately shown that "a conflict of interests is actually indicated." Certainly it is obvious that a conflict is "likely to develop" at the trial (or before) and that the court is faced with a situation where the public would be convinced that the court had permitted a conflict of interests to exist and continue. The federal courts should at least impose as broad a test for conflicts of interest as that imposed in the state in which the trial will take place. Actually, however, as we have shown, the federal courts have always been as strict or stricter in governing the conduct of the attorneys before them.

CONCLUSION

The only issues in this litigation are ones of factual evaluation. The record in this matter virtually compels

the conclusions reached by the Ninth Circuit. That court reached its determination in accordance with established principles and in harmony with prior federal court decisions and with the standards established by the Supreme Court of the state in which the case will be tried.

As the court recognized in *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964), there are no practical reasons justifying a court in straining to find a reason not to disqualify an attorney from a particular litigation if any reasonable question is raised as to the propriety of his doing so. The plaintiffs will not be prejudiced by Mr. Boyko's disqualification, as there are many competent attorneys available to them.

For these reasons, the Respondent respectfully submits that this Honorable Court should promptly deny the Petition for a Writ of Certiorari.

Dated June 2, 1967.

Respectfully submitted,

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